No. 208.

Brf. of Atty for Petitioner.

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Supreme Court of the United States

OCTOBER TERM 1901

No. 208

FREDERICK WILLIAMS,
Petitioner

against

GEORGE C. GAYLORD, CHARLES E. MADDRILL and DWIGHT T. ROLFE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER

C. WALTER ARTZ,
Of Counsel

Supreme Court of the United States

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FREDERICK WILLIAMS,
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Brief for Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT.

This suit was brought by the petitioner, the trustee of a first mortgage made and executed by the Gold Hill Mining Company, a corporation of the state of West Virginia covering certain mining property located in Nevada County in the State of California, to obtain a decree of foreclosure and sale; and the respondents with the firm of Martin Brothers & Muir were joined as defendants additional to the

Company upon the ground that they had or claimed to have some interest in or lien upon the premises sought to be foreclosed either as judgment creditors or otherwise; which interest or lien, if any, the complainant however, averred was *subsequent* and subordinate in time and degree to the lien of the mortgage sued upon.

Bill, Paragraph VIII; Record, p. 6.

The company and said Martin Brothers & Muir defaulted in pleading and a decree *pro confesso* was entered against them.

Record, p. 18.

The mortgage was dated July 1, 1890, acknowledged July 24, 1890 and recorded July 30, 1890.

Record, pp. 8, 12, 13.

The respondents are judgment creditors whose judgments were entered long after the record of the mortgage in suit, i e, in the years 1896 and 1897.

Record, pp. 23, 27, 29, 37, 44, 45, 131, 144, 151.

The judgment creditors filed pleas and also answered the bill.

Record, pp. 19, 20, 25, 37, 48.

The pleas were overruled because the answers were on file and without any consideration of the merits.

Opinion: Record, pp. 52, 53.

Proofs having been taken (Record, pp. 65-105, 196) and the answers of the respondents having been

amended (Record, pp. 34, 41) the Circuit Court after final hearing brought on upon August 14, 1899, handed down an opinion, on August 28, 1899, (Record, pp. 53, 65) upon which a decree was entered on September 26, 1899, dismissing the bill.

Record, pp. 49, 50.

The bill shows the authorization of the mortgage and bonds to the extent of $50,000; the execution and delivery of the mortgage; the description of the mining and other property conveyed in the mortgage and located in the County of Nevada and State of California; the due formal execution and record of the mortgage; the acceptance of the trust by the trustee; the execution and delivery of the bonds authorized to be issued; the fact that they were issued for value and are now outstanding; the default of the mining company in interest on the 1st day of July, 1893, and the subsequent default in principal under the terms of the mortgage; the existence of subsequent liens held by the respondents; the substitution of the petitioner as trustee in the stead of G. Livingstone Morse, who was originally selected and who accepted that position; and the fact that no other proceedings for the collection of the bonds secured by the mortgage have been had.

Bill, Paragraphs II-X; Record, pp. 2-7.

The Defence of the Judgment Creditors.

The defence arising upon the amended answers of the *judgment creditors* consists in the main of an allegation that the mortgage was not authorized in conformity to the provisions of the first section of

the Act of the Legislature of the State of California passed April 23, 1880, and entitled "An Act for the further protection of *stockholders* in mining companies" requiring the assent of two thirds in amount of the stockholders of any mining company as a prerequisite to the sale, leasing or mortgaging of its land.

Amended Answers: Record, pp. 35, 42, 43, 81-83.

The remaining defences suggested were abandoned as hereafter indicated.

The Issues.

UPON THIS DEFENCE THE FOLLOWING QUESTIONS AROSE:

1. Whether *subsequent judgment creditors* could under the circumstances take the benefit of the statute mentioned and be heard to question the validity of the mortgage upon that ground.

2. Whether the Circuit Court was obliged to follow the decision of the Supreme Court of California holding that the question can be raised by judgment creditors.

3. Whether the statute applied to foreign corporations.

4. Whether, if the statute did apply to the defendant Mining Company, there was a sufficient authorization or ratification of the mortgage thereunder.

6. Whether independent of technical compliance with the terms of authorization or legal ratification laid down in the statute mentioned, the mortgage and bonds which it secures were validated by

acquiescence and retention of consideration on the part of the Mining Company.

UNDER THE DENIALS of the amended answers the complainant was also put to proof of the fact of the execution and delivery of the bonds and mortgage for value received by the Mining Company.

Testimony of Littlefield and Williams.

Record, pp. 65-93.

THE VALIDITY OF THE BONDS was however conceded by counsel on the application for *certiorari* in the following language: "*The validity of the indebtedness is not questioned.*"

Argument of Respondents opposing issue of writ of *certiorari*, p. 40.

AN ISSUE WAS ALSO RAISED as to the proper formal execution of the mortgage *but this was abandoned at the hearing before the Circuit Court of Appeals.*

The Decision of the Circuit Court.

The Circuit Court did not pass upon all of the questions presented but decided:

A. That the Act of 1880 applied to foreign corporations owning mining ground in California, by reason of the Constitutional provision (Constitution of California. Art. XII. §15) to the effect that "no corporation organized outside the limits of this State shall be allowed to transact business in this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State," and because it declared the public policy of the State.

B. That the statute in question did not refer to the internal management of mining companies and is not therefore objectionable when applied to foreign corporations.

C. That the mode of ratification indicated in the statute was essential and exclusive.

D. That the stockholders of the Mining Company did not ratify the mortgage as required by the statute.

E. That subsequent judgment creditors were not estopped to set up absence of ratification under the statute.

F. That the decisions of the Supreme Court of the State of California to the effect that judgment creditors may raise the question are not enunciatory of general or commercial law but are constructive of the statute and bind the Federal tribunals.

The Court considered none of the other points raised but dismissed the bill.

Opinion, Record, pp. 53, 65.

Decree, Record, pp. 49, 50.

The Decision of the Circuit Court of Appeals.

Upon appeal the Circuit Court of Appeals for the Ninth Circuit held

1. That the ruling of the State Supreme Court to the effect that judgment creditors could plead and take the benefit of the statute was a construction thereof and a declaration of the local law; and therefore that it was binding upon the Circuit Court.

2. That the first section of the statute related to corporations foreign as well as domestic, while its third and fourth sections related only to domestic corporations.

3. That by decision of the Supreme Court of California a literal compliance with the first section of the statute was essential to the validity of a mortgage upon mining property; and that no such compliance was shown in the case at bar.

Opinion, Record, pp. 169-713.

A petition for rehearing was filed June 12, 1900, and denied October 15, 1900.

Record, pp. 174-181.

Certiorari Granted by this Court.

Thereupon the complainant filed in this court his petition for a writ of *certiorari* to bring up this cause for review under Section 6 of the Act of Congress of March 3, 1891 (26 U. S. Stats 826); his petition was granted (180 U. S. 637), the writ of *certiorari* was accordingly issued (Record, p. 182) and the record and proceedings in this cause have been returned to this Court under stipulation pursuant to the writ.

Record, p. 183.

IT IS SUBMITTED THAT THE CIRCUIT COURT OF APPEALS ERRED in affirming the decree of the Circuit Court and in uniting with the latter Court in its decision of the points above outlined.

IN SUPPORT OF OUR POSITION in this regard and as grounds for a reversal of the decrees of the courts below attention is called to the following:

ARGUMENT.

I.

The decision of the Supreme Court of California to the effect that judgment creditors may take advantage of the Act of 1880 is not binding upon the Federal Courts either as constructive of that Statute or determinative of a local rule of property.

The statute in question is entitled:

"*An act for the further protection of stockholders in mining companies.*"

Section 1 thereof (until amended subsequent to the accrual of the rights of the parties hereto) read as follows:

"It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain, in any way, any additional mining ground, unless such act be ratified by the holders of at least two thirds of the capital stock of such corporation. Such ratification may be made either in writing signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders meeting called for that purpose."

Stats. Cal. 1880 p. 131.

The Nature and Characteristics of the Statute.

Statutes of this character are common to many other of the States and although usually without title and merely forming sectional portions of revised or compiled laws, they have universally been held both by

Federal and State courts to be intended for the protection and security of the *stockholders alone*, who by their own action may be estopped to question the validity or regularity of the proceedings: so that it is necessary that even a stockholder should dissent in order that he may raise the question.

The State may in a proper case by direct proceeding avail of the objection but it can never be raised by creditors whether their claims have been reduced to judgment or not.

Hervey v. Ill., &c. Ry. Co., 28 Fed. 169. (Mr. Justice HARLAN at Circuit in Illinois.)
Thomas v. Citizens Ry. Co., 104 Ill. 462.
Beecher v. Marquette &c., R. M. Co., 45 Mich. 103. (Per COOLEY, J.)
The Vigilancia 68 Fed: 781.
(U. S. D. C. S. D. N.Y. Affirmed U. S. C. C. A. 2nd Circuit: 73 Fed. 452.)
Greenpoint Sugar Co. v. Whiting, 69, N. Y. 328.
Rochester Savings Bk. v. Averell, 96 N. Y. 467.
Star P. Co. v. Andrews, 9 N. Y. Supp. 731.
Campbell v. Argenta Co., 51 Fed. 1. (Circuit Court, Dist. of Montana.)
Boston &c. Co. v. Montana &c. Co., 89 Fed. 529. (Circuit Court: Dist. of Montana.)
Boyce v. Montauk &c. Co., 37 West Va. 73.
Coe v. East &c. Ry. Co., 52 Fed. 531.
(Circuit Court, Northern Dist. of Alabama.)
Alabama &c. Co. v. McKeever, 20 S. Rep. 84. (Supreme Ct. Alabama.)
Antietam Paper Co. v. Chronicle &c. Co., 115 N. C. 143.
Gordon v. Preston, 1 Watts 385.

Cook on Corporations. (4th Ed.) §808.
Short on Railway Bonds and Mortgages, §181.

See also elaborate note to Southern Building &c. Association v. Casa Grande Stable Co. (Supreme Court Alabama) 14 Am. and Eng. Corp Cas. N. S. 199.

The case of Hervey v. Illinois Midland Ry. Co. *supra* was argued upon exceptions to the report of a special commissioner assigned to take the testimony and report his conclusions of law and fact in a consolidated cause composed of several foreclosure suits and a class suit brought by the holder of a majority of the stock of the railway company and its constituents hereinafter mentioned, and on behalf of certain judgment creditors of the Paris & Decatur Railroad Company one of the constituents, to marshal of the assets of the Illinois Midland Railway. [redacted]

In September 1874 the Peoria, Atlanta & Decatur Railroad Company whose name was subsequently changed to that of the Illinois Midland Railway Company purchased of the Paris & Decatur Railroad Company and of the Paris & Terre Haute Railroad Company the franchises and property of the latter, received deeds of conveyance therefor and assumed payment of all the indebtedness of said two companies.

Said Mr. Justice HARLAN (pp. 173-174) outlining and deciding the issue pertinent here.

"Creditors of the before mentioned railroad companies, who are parties herein, claim that in the execution of the mortgages in question certain requirements of the statutes of Illinois were not observed,

and consequently that each of those instruments are void. Those mortgages were executed by the companies at the following dates: By the Peoria, Atlantic & Decatur Railroad Company, April 25, 1872: by the Paris & Decatur Railroad Company, July 1, 1872; by the Paris & Terre Haute Railroad Company, April 1, 1874: and by the Illinois Midland Company, January 1, 1875. It is contended that, by the statutes of Illinois in force prior to and at the time of the execution of those mortgages, the assent of two thirds in amount of the stock of the corporation, expressed in a prescribed mode, was essential to the validity of any railroad mortgage. In support of this position reference is made by counsel to the tenth subdivision of section 19 of the act of March 1, 1872. Rev. St. Ill. (Hurds Ed. 1880) p. 817.

* * * * * *

The objection under consideration can have no application to any one of the sectional mortgages except that executed by the Paris & Terre Haute Railroad company, which was organized after the passage of the Act of 1872. But it cannot avail the parties making it for several reasons one of which is, that as the Paris & Terre Haute Railroad Company admits the execution and delivery of the mortgage, it must, *as between the company and its creditors* be deemed a valid instrument. The provision in the Act of 1872, making the assent of a given number of stockholders essential to the validity of a mortgage is primarily, if not exclusively, for the benefit of stockholders. If it be conceded that stockholders of a railroad corporation formed under the act of 1872, could, as against *bona fide* holders of bonds secured by a mortgage executed by such corporation, defeat a mortgage not executed with the expressed assent of the requisite number of stockholders, it does not follow that the creditors of the corporation could raise any such question. Under the circumstances disclosed by the record, the stockholders of the Paris & Terre Haute Railroad Company are estopped to say that the mortgage is not a valid security, according to its terms for the payment of the bonds intended to be secured by it. Much less can creditors urge such an objection particularly when the State has not, by any direct

proceeding, questioned the validity of the mortgage under the act of 1872."

The case of Campbell v. Argenta etc. Co. 51 Fed. 1. presents the same situation.

There the question of compliance with the Montana statute, as precise at least as the Act of 1880, was sought to be raised by subsequent judgment creditors in defence of a foreclosure suit.

Said the Court upon this subject (pp. 8-9):

"The contract being a voidable one, the question arises as to who can take advantage of any defect in entering into the same. The rule that is established by the statute requiring a meeting of stockholders, etc., and the giving of their consent to the making of a mortgage was for the benefit of the stockholders of the corporation executing the same. This was the view taken of a similar statute by Justice COOLEY and Justice HARLAN in the cases of *Beecher* v. *Rolling-Mill Co. supra* and *Hervey* v. *Railway Co. supra*. The answer must be, then, that only the corporation, or the stockholders of the corporation, can take advantage of the contract under discussion, *Railroad Co.* v. *Ellerman* 105 U. S. 166. This rule would exclude the right of any of the lienholders upon the property embraced in the mortgage from raising the issue that the mortgage was not duly authorized by a vote of the stockholders at a meeting duly called. When a contract made by a corporation is only voidable, the corporation and stockholders can be estopped by their conduct from avoiding the same. *Kent* v. *Mining Co.* 78 N. Y. 185, 186. In the case of *Railway Co.* v. *McCarthy* 96 U. S. 258, the supreme court say:

> "The doctrine of *ultra vires* when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

This doctrine is ably asserted in *Whitney, Arms Co.* v. *Barlow* 63 N. Y. 62 It is but proper to remark, however, that the decisions in the courts of

New York, and that of the supreme court, upon the doctrine of *ultra vires*, are not always in harmony. The courts of New York generally follow the rule expressed by COMSTOCK, J. in *Bissell* v. *Railroad Co.* 22 N. Y. 259, while the views expressed by SELDEN, J. in that case are more in accordance with those which have been maintained in the federal courts; yet upon this point the Courts of that state and the Supreme court seem to have united. It is difficult to see upon what principal a contract, which is void as in violation of public policy, as an act of a corporation is decided to be in *Pittsburgh, C. & St. L. Ry. Co.* v. *Keokuk & H. Bridge Co., supra* and which is not authorized by its charter or the law under which it is organized can be maintained, because it might work a wrong or injustice. But this court feels bound by the rule expressed in *Railway Co.* v. *McCarthy*, (96 U. S. 258) and in accordance with it would have to hold that even the corporation and stockholders in this case would be estopped from asserting that the mortgage was void, although it might be held that it was beyond the power of the corporation to execute the same. But holding, as I do, that the mortgage was only a voidable contract, I have no difficulty in maintaining that the corporation and the stockholders in this case would be estopped from denying its validity. The bonds sued on in this case were the consideration for the property embraced in the mortgage; neither the corporation nor the stockholders have ever expressed any desire to disaffirm that contract. The contract was entered into with the knowledge of the stockholders; the corporation held and enjoyed the property so obtained; hence it would be a wrong to allow the corporation to disaffirm this mortgage, and, if neither the stockholders nor the corporation could now object to this mortgage, *much less could the creditors of the Argenta Company object to the validity thereof.*"

It is thus easy to see the reason for the rule so generally applied. It is but one phase of the doctrine, well established in this Court, that no one but the state or a dissenting stockholder my avail of an *ultra vires* act, or an irregularity where the defect

consists in the failure on the part of a corporation or its officers, directors or stockholders to comply with some formality prerequisite to the orderly performance of the function in question.

Jones v. Guaranty &c. Co. 101 U. S. 622.
Railroad Co. v. Ellerman 105 U. S. 166.
St. Louis &c. R. R. Co. v. Terre Haute &c. R. R. Co. 145 U. S. 393, 403.
Zabriskie v. R. R. 23 How. 381, 398.
Central Trans. Co. v. Pullman's &c. Co. 139 U. S. 24, 42, 60.
Davis v. Old Colony R. R. 131 Mass. 258, 260.
See also Sioux City &c. Co. v. Trust Co. 82 Fed. 124, (U. S. C. C. A. 8th Circ.)

In Jones v. Guaranty &c. Co. 101 U. S. 622 creditors sought to attack a mortgage upon after acquired property as *ultra vires*. Said Mr. Justice SWAYNE of the mortgage in question (p. 628):

"If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the state. As to all other parties it must be held valid and may be enforced accordingly. *Silver Lake Bank* v. *North* 4 Johns (N. Y.) Ch. 370; *National Bank* v. *Matthews* 98 U. S. 621. In the latter case this subject was fully examined.

A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage it has been cured by acquiescence and ratification by the mortgagor. *No one else can raise the question. All other parties are concluded. Gordon* v. *Preston* 1 Watts (Pa.) 385.

Where money had been obtained by a corporation upon its securities which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the

liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders so far as the money thus raised is applied for the benefit of the company. *In re Cork & Youghal Railway Co.* Law Rep. 4 Ch. 748.

A court of equity abhors forfeitures and will not lend its aid to enforce them. *Marshall* v. *Vicksburg* 15 Wall 146. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Lewis* v. *Lyons* 13 Ill. 117."

This case and Railroad Co. v. Ellerman 105 U. S. 166 illustrating the same principle, were both decided several years before the California Supreme Court decided the case of McShane v. Carter 80 Cal. 310, hereinafter referred to and determine the views of this Court upon the subject.

The recent case of St. Louis &c. Railroad v. Terre Haute &c. Railroad 145 U. S. 393 arose out of the filing of a bill in equity designed to set aside and cancel a ninety-nine year lease. This Court speaking through Mr. Justice GRAY, say (at pp. 402-403) in affirmance of a decree sustaining a demurrer to the bill:

"The plaintiff relies on the Statute of Illinois of February 16, 1865 (in force at the date of this contract, but since repealed by the Revised Statutes of 1874) by which it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said *written* consent, signed by the resident stockholders

in Illinois, *shall be null and void*"; and it was provided "that nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the State of Illinois" Illinois Public Laws of 1865 p. 102.

Although this Statute in terms declares that any such lease made without the written consent of the Illinois stockholders, "shall be null and void," it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. *It did not limit the scope of the powers conferred upon the corporation by law an excess of which could not have been ratified or made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped by lapse of time or otherwise to deny.*" (Citing numerous cases.)

To the same effect and referring to a statute like that under discussion, see the admirable opinion of Judge COOLEY in Beecher v. Marquette, &c., Co., 45 Mich. 103, in which among other things the learned court says (at p. 108):

"Courts often speak of acts and contracts as void when they mean no more than that some party concerned has a right to avoid them. . . . . If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it."

In the case of Ditch Co. v. Zellerbach 37 Cal. 543, SAWYER, J. elaborately discussed the subject of *ultra vires* as applied to corporations. He said:

"The term '*ultra vires*', whether with strict propriety or not, is also used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it

under any circumstances or for any purpose. An act is also sometimes said to be *ultra vires* with reference to the right of certain parties when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose; and the rights of strangers dealing with corporations may vary according as the act is *ultra vires* in one or the other of these senses. All these distinctions must be constantly borne in mind in considering the question arising out of dealings with a corporation. When an act is *ultra vires*, in the first sense mentioned it is generally if not always void *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case."

There is no necessity in the case at bar for the Court to determine from the context of the statute that it "would seem to have been enacted for the protection of stockholders alone and intended to be availed of by them only," for the legislature of California has by the title of the Act of 1880 declared it to be "for the further protection of *stockholders* in mining companies"; so that the legislative intent is clear and need not be deduced by reasoning. There is nothing to construe or interpret in that regard. The act is perfectly plain and its beneficiaries expressly defined.

The cases of McShane v. Carter 80 Cal. 310 and Pekin Mining Co. v. Kennedy 81 Cal. 356.

Notwithstanding this overwhelming weight of authority the Supreme Court of California by a divided court three judges only sitting, and *both of those concurring being commissioners appointed by*

law to assist the regular judges, decided the case of McShane v. Carter (80 Cal. 310) to the effect that judgment creditors might set up the Act of 1880 as against the prior grantee of a domestic corporation. This decision was afterward in Pekin Mining Co. v. Kennedy (81 Cal. 356) followed and applied without independent reasoning to the case of a grantee of a foreign corporation, *which in fact* although not so stated in the report *was subject to the provisions of a similar statute in the state of its domicile* (Illinois).

See Illinois Revised Statutes (1874) c. 114 §20.

There is of course no doubt that these decisions are contrary to the established law of corporate relations as laid down by this Court and the State courts generally. The Circuit Court of Appeals was quick to recognize this and careful to refrain from any expression of the individual views of its members, resting its decision of the point entirely upon the proposition that the decisions of the Supreme Court of California were exclusively authoritative and binding upon the Federal courts in that State.

Record, p. 171.

The binding character of the State court decision depends entirely upon the assumption that it either (1) construed the statute or (2) declared a local rule of property effective only within the state.

If this, in our opinion, were the effect of the decisions of the Supreme Court of California, enforcement of the mortgage in this case would never have been sought.

We are well aware that the established decisions of the State courts will be in general followed by the Federal courts in suits in equity although the provisions of the 34th section of the Judiciary Act are only applicable to actions and proceedings at law.

It is but reasonable that the statutes of the various States should be construed by the local courts and that this construction should be adopted by the Federal tribunals.

It is equally reasonable that local rules of property based upon the common law of the several States as enounced by their respective courts duly constituted and established should be respected to the same extent by the Federal courts sitting in the local jurisdictions.

When, however, the State court decisions are not constructive of a State statute nor enunciatory of a *well settled* local rule of property, they are as clearly possessed of no such authority, but can only be used in the Federal courts by the reasoning contained in them to shed light upon similar situations, and are of no greater weight than decisions of other State courts of co-ordinate rank.

We submit that the decision in the *McShane Case* upon which the subsequent case in this respect rests does not operate to construe the statute or to enunciate a local rule of property; and that therefore it is not effective to control the action of the Federal courts in this case.

A. No statutory construction is involved.

Upon the proof before it, the Supreme Court of California took the following position with respect to the meaning and effect of the Statute (80 Cal. 312):

"In our opinion the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two thirds of the stock, given as prescribed in the Act."

So far there can be no doubt that the Court construed the act. But the Court then proceeded to draw the following *conclusions.*

(1) "*And it follows* without such consent the title does not pass."
(2) "*And if this be so,* the question can be raised by anyone who connects himself with the title of the corporation which owned the property, as well as by the stockholders thereof."

Why does this second conclusion follow? Certainly not from anything contained in the act itself, for upon this point it is absolutely silent and *there is nothing to construe or interpret.* It must depend upon the relation which to the Court's mind existed between judgment creditors of a corporation, on the one hand and its officers and stockholders on the other. The Court does not in the slightest degree intimate that there are any terms in the statute which under well known rules of construction would indicate that the legislature meant to include judgment creditors among the beneficiaries of the statute. The conclusion that they may raise the question is purely a conclusion not even derived directly from the ruling of the Court in the construction of the statute to the effect that in the absence of the ratification prescribed the directors "had no power to convey;" but is deduced as a sort of subconclusion of the conclusion (totally unwarranted under St. Louis &c. R. R. Co v. Terre Haute &c. R. R. Co 145 U. S. 403) that "without such consent the title does not pass."

With all due respect it is submitted that this conclusion so directly at variance with the great weight of authority and particularly so because of the plain and direct language of the title of the act, can in no sense be held to be a construction of the statute and therefore binding upon the Federal courts. It is in fact and in law *a decision that judgment creditors are not estopped* to avail themselves of acts not even heinous enough to be *ultra vires* the corporation but merely irregular and beyond the power of the officers performing them. That this is a matter of general law seems scarcely more needful of argument than that the conclusion reached is directly contrary to the principles laid down by this Court as well as by the State and Federal courts generally.

It seems to us that the Circuit Court of Appeals failed to distinguish between a decision of the State court construing the terms outlining the effect of the statute *as enacted* and a decision declaring that certain other persons not mentioned or referred to in the statute, may by reason of relations existing between them and the stockholders *under general principles of corporation law*, become beneficiaries of the statute under consideration. We submit that a case of the latter class does not construe a statute or establish a local rule of property, but is merely a decision upon the general law of corporate relations.

In Sawyer v. Oakman (1 Lowell 134 Fed. Case No. 12,404) it was held that the effect which the statute of Massachusetts prohibiting work on the Lord's Day under a penalty should have on the rights of the parties to a collision cause pending in the District Court, one of whom has violated the act in moving his vessel on that day, is not a question of the construction of a statute *but of the application of*

general rules of law to the case of a person who has violated such a statute, and the District Court must follow the decisions of the Supreme Court of the United States, and not those of the State tribunals.

Said LOWELL, J. (21 Fed. Cases 578):

"Now to the extent of holding that work done in contravention of the statute is illegal it may be that the local law should govern, but the statute is silent concerning the legal consequences of doing such an act excepting to the extent of the penalty directly imposed. *The effect which it may have on the wrong-doer's standing as regards third persons is no part of the construction of the statute but* THE APPLICATION OF A GENERAL PRINCIPLE OF LAW."

This case was affirmed by this Court in an opinion not reported (Reporters note, 21 Fed. Cas. 578) and its reasoning rests in great part upon that of Phila. &c. R. R. v. Philadelphia &c. Towboat Co. 23 How. 209.

In Bucher v. Cheshire R. R. Co. 125 U. S. 555 this Court (Mr. Justice FIELD and Mr. Justice HARLAN dissenting) followed *in a common law case* the established rulings of the Massachusetts courts sustaining an act to the effect that the Sunday Statute should be a defence to an action against a common carrier.

The opinion (per Mr. Justice MILLER) is harmonious with the remarks of Judge LOWELL which we have just quoted, as follows (p. 580):

"It is not easy to see that there was anything in the case as it arose in the Circuit Court which required a construction of the meaning of that Statute, after eliminating what has just been suggested as to the significance of the words 'necessity' or 'charity'. The remainder is a short prohibition

against travelling upon the Lord's Day, and provides for the imposition of a penalty for so doing. This is very plain; it admits of no doubt as to its meaning, and its validity has never been considered. When therefore the Supreme Court of Massachusetts in a long line of decisions, has held that the violation of this statute may be set up as a defence to a liability growing out of the negligence of a railroad company in carrying passengers upon its road, it must have been on some other ground than that to be found in the statute itself. There is no provision in it, and there is no necessary inference to be drawn from its language that it was intended to control the relations between the passenger and the carrier or to modify the obligations of the one to the other."

The Massachusetts decisions were followed simply upon the ground that they established a rule of law of a *purely local* application.

This Court is careful always to note in statutory construction cases that the statute is the direct basis of the decision.

The fact that a statute may be material to the historical development of the case in hand but its construction not the actual point decided by the State court, at once removes the case from the category just mentioned and the Federal courts act upon their own reasoning.

In Olcott v. Supervisors, 16 Wall 678, it was held that whether or not the construction and maintenance of a railroad owned by a corporation, and constructed and maintained under a statute of a State authorizing such construction and maintenance, is a matter in which the public has any interest of such a nature as to warrant taxation by a municipal division of the state in aid of it is a question of general law and not of statutory construction.

Said STRONG, J.: (p. 688)

"Whether the act of Assembly of the State of Wisconsin, approved April 10th, 1867, under which the county orders or promissory notes sued upon, in this case, were issued was a lawful exercise of constitutional power, is the only question in the case. . . . . .

(p. 689) At the outset we are met by the fact that the Supreme Court of the State has decided the act was unauthorized by the Constitution. It was thus ruled in *Whiting* v. *Fond du Lac* (25 Wis. 188). If that decision is binding upon the Federal courts, if it has established a rule which we are under obligations to follow, the matter is settled.

It is undoubtedly true in general that this court does follow the decisions of the highest courts of the States respecting *local questions peculiar to themselves*, or respecting the construction of their own constitution and laws. *But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the Federal Courts adopt as rules for their own judgments.* That *Whiting* v. *Fond du Lac County* was not a determination of any question of local law was manifest. It is not claimed to have been that. But *it is relied upon as having given a construction to the Constitution of the State. Very plainly, however, such was not its character or effect.* The question considered by the court was not one of interpretation or construction. *The meaning of no provision of the State Constitution was considered as declared.* What was considered was the uses for which taxation generally, taxation by any goverment, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation is a matter of public concern. It was asserted (what nobody doubts) that the taxing of a State extends no farther than to raise money for a public use, as distinguished from private, or to accomplish some end public in its nature, and it was decided that building a railroad if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest, of such a nature as to warrant

taxation in its aid. For this reason it was held that the State had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the Legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the Constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no State court can conclusively determine for us. This consideration alone satisfies our minds that Whiting v. Fond du Lac County furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

These authorities we submit show that the question of statutory construction is not in the case at all so far as judgment creditors are concerned.

B. There is no local rule of property involved.

In Pekin Mining Co. v. Keanedy, (81 Cal. 356) the rule laid down in McShane v. Carter *supra* was as we have pointed out, extended without argument to a foreign corporation, organized under the laws of a State (Illinois) where a statute similar to that under discussion existed. The statute itself does not distinguish between foreign and domestic corporations so far as the first section goes. There is moreover no limitation within the State of the "mining ground" mentioned. If it be shown that this statute may affect property outside the limits of the State of

California it would seem clear that there is no local rule of property involved.

In other words what is meant by a local rule of property is that the nature of the rule shall be such that it is essentially and exclusively local as contra distinguished from a rule of general application which may in the *case under consideration* be applied to local affairs. *It is the nature of the rule itself and not the fact of its casual local application which determines the controlling effect of the State court decision laying it down.*

In Warburton v. White, 176 U. S. 484, Mr. Justice WHITE says (p. 496) referring to community property laws in Washington Territory and the rule of interpretation thereof:

"The rule is subject to a limitation, which is that where State decisions have interpreted State laws *governing real property or controlling relations which are essentially of a domestic and State nature; in other words, where the State decisions establish a rule of property* this court when called upon to interpret the State law will, *if it is possible to do so, in the discharge of its duty,* adopt and follow the settled rule of construction affixed by the State court of last resort to the statutes of the State and thus conform to the rule of property within the State."

The Supreme Court of California has never had occasion to consider the position of judgment creditors claiming the benefit of a similar statute enacted by the legislature of the State wherein the corporation had its domicile but not of the State wherein the land to be foreclosed or conveyed might lie. This question might however arise in a case where the corporation was domestic in California, part or the whole of its mining ground lay without the State and the foreclosure suit proceeded within the State.

Under the principles laid down in Muller v. Dows 94 U. S. 444 (and applied in Woodbury v. A. & K. R. R. Co. 72 Fed. 374, 375 where a land grant in another State was also included in the foreclosure) the decree in such a suit, the court having acquired jurisdiction of the parties, would be good as to property in the foreign State; and under McShane v. Carter *supra* we think that there is no doubt that the court would apply the statute to the mortgage.

In the case of Muller v. Dows 94 U. S. 444 it was held that a decree foreclosing a mortgage executed by a railroad company of its entire railroad and franchises and ordering a sale, passed by the Circuit Court of the United States for the District of Iowa, which in a suit there pending, had jurisdiction of the mortgagor and the trustees in the mortgage, was not invalid because a part of the property ordered to be sold was situate in the State of Missouri.

Said this Court, speaking through Mr. Justice STRONG (p. 449).

"Without reference to the English chancery decisions, where this objection to the decree (i. e. that it could not effect property outside the State) would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot in a proper case effect the transfer by the agency of the trustees when they are complainants. In *McElrath* v. *The Pittsburg and*

Steubenville R. R. Co., 55 Penn. St. 189—a bill for foreclosure of a mortgage—in which it appeared that a railroad company whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchasers in further assurance. And the court can direct the trustees to make a deed to the purchasers in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

The case of Woodbury v. Allegheny & Kinzua R. R. Co. 72 Fed. 371 was instituted in the Circuit Court for the Western District of Pennsylvania to secure the foreclosure of a joint mortgage covering a line of railroad located in Pennsylvania and New York and also certain lands conveyed by the president of the railway company, Bullis, similarly situated and constituting additional security under the mortgage. A decree of foreclosure was directed, BUFFINGTON, District Judge (with whom also sat and concurred ACHESON, Circuit Judge) saying (p. 375).

"We are of the opinion that the Circuit Court originally had jurisdiction of their (complainants) present bill; that its jurisdiction was not ousted by the filing of a bill in the New York state court; and that under the facts peculiar to this case, the complainants had the right to file this bill, and having filed it, and all parties in interest having appeared and taken part in the case, including the railroad com-

pany, Mr. Bullis, and the trustee, our jurisdiction to foreclose the mortgage upon all the property included *therein, as well that within the State of New* York as that within the State of Pennsylvania, seems to us to be clear. Muller v. Dows 94 U. S. 444. Massie v. Watts 6 Cranch 148; Bradley v. Railroad Co. 36 Pa. St. 141; Burnley v. Stevenson 24 Ohio St. 474; McElrath v. Railroad Co. 55 Pa. St. 208."

See also, Blackmere v. Helena &c. R. R. Co. 2 Flipp. 525, 537, 538.
Wilmer v. Atl. & R. Air. Line Ry. Co. 2 Woods, 447.
Brown v. C. & O. Canal Co. (ALVEY Ch. J. sitting in the Circuit Court for Washington Co.) 73 Md. at p. 607.

Railroad foreclosures naturally present striking instances of the applicability of the jurisdiction of equity in this respect. The same doctrine applies to real estate generally.

As was stated in the case of Brown v. C. & O. Canal Co. *supra.*

"It would seem to be settled both in England and in this country, that where a court of equity acquires authority and jurisdiction to act upon the person, it may indirectly act upon real estate, situate in another state or jurisdiction, by means and through the instrumentality of this authority over the person; and that it may compel such person to give effect to its decree respecting such property, whether it goes to the entire disposition of it, or only to affect it with liens or burthens" (citing STORY'S Conflict of Laws §544).

This principle, long ago illustrated in the case of Penn v. Lord Baltimore 1 Ves. sr. 444 has been sustained by numerous adjudications not involving railroad lines, among which may be cited:

Toller v. Carteret, 2 Vern 494.
Massie v. Watts, *supra.*
Dull v. *Blackman*, 169, U. S. 243.
Carrington v. Brents, 1 McLean 167.
Lyman v. Lyman, 2 Paine 46.
Rourke v. McLaughlin, 38 Cal. 196, 200.
Ward v. Arredondo, 1 Hopk. Ch. 243.
Newton v. Bronson, 13 N. Y. 587. See also note to this case in 67 Am. Dec. pp. 98-101.

In Toller v. Carteret *supra* a bill to foreclose a mortgage upon the island of Sarke, a part of the duchy of Normandy, and under the jurisdiction of the courts of Guernsey, was sustained, the defendant having been served with process within the jurisdiction of the court; for *equitas agit in personam.*

In Lyman v. Lyman *supra* it was held that upon a bill for an account and settlement of a partnership and for general relief, the court might direct a public sale within the State of land without the State, and compel the parties to convey title accordingly.

In Massie v. Watts, 6 Cranch 148, Mr. Chief Justice MARSHALL after reviewing the English cases says: (p. 160)

"Upon the authority of these cases and of others which are to be found in the books, as well as upon general principles this court is of opinion that, in a case of fraud, of trust, or of contract the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be effected by the decree."

Said the Supreme Court of California in Rourke v. McDonald, 38 Cal. 196 (at 200):

"The rule seems to be that specific performance will be decreed whenever the parties, or the subject matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court."

While it is true that in the opinion of this Court in the case of Carpenter v. Strange 141 U. S. 87 (at 106) it was said that "direct action" upon real estate located in Tennessee "was certainly not within the power," of the New York Court in a suit to have a deed declared null and void, the decision upon that branch of the case rested upon the omission of the New York Court to decree *in personam*.

Said Mr. Chief Justice FULLER, (p. 106):

"To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res. By its terms no provision whatever was made for its enforcement as against Mrs. Strange in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the court announced.*"

The case of Hart v. Sansom, 110 U. S. 151, 155, is corroborative of the same view.

With the last two cases cited before it this Court through Mr. Justice BREWER in the case of Dull v. Blackman, 169 U. S. 243 (at 246) speaking of a suit to quiet title, said:

"Upon these facts we remark that as the land, the subject matter of this controversy, was situate in Iowa litigation in respect to its title properly belonged to the courts within that State. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, 107, although *if all the parties interested in the land were brought per-*

sonally before a court of another State, its decree would be conclusive upon them and thus IN EFFECT DETERMINE THE TITLE."

THE RESULT OF THESE AUTHORITIES is that the decision of the Supreme Court of California in the case of McShane v. Carter *supra* may in a given instance have the effect of determining the title to lands without the State. This may be accomplished in a suit brought by judgment creditors against the mortgagee, other proper parties being joined, or upon a cross bill in a foreclosure suit. In either case the court having all the parties before it would clearly be possessed of ample power to make a decree awarding affirmative relief by way of reconveyance or release by the mortgagee and to enforce such decree by process *in personam.*

HAVING THE PRINCIPLE UNDERLYING THESE CASES IN MIND, it is interesting and important to the decision of the instant suit to notice that the New York statute so strikingly similar in terms to that of California (See Petition for Rehearing, Record p. 175 for parallel columns) was under discussion in the case of First National Bank v. G. V. B. Mining Co. 89 Fed. 439 (affirmed by the Circuit Court of Appeals for the Ninth Circuit, 95 Fed. 23), which was a suit brought in the Circuit Court for the District of Idaho to foreclose a mortgage upon land located within that State and made by a New York corporation. Objection was made that the New York statute had not been complied with and the Circuit Court and Circuit Court of Appeals both applied that statute to the case. Upon like reasoning it must have applied the California statute if the corporation mortgagor had been organized in that State.

In Boyce v. Montauk, &c. Co. 37 W. Va. 73, the Supreme Court of Appeals applied the New York statute to the case of a foreclosure by a New York corporation of land in West Virginia but applied general law to determine whether the corporation was estopped to raise the question of non-compliance with that statute. The Court rested its decision of the point mainly upon the case of Beecher v. Rolling Mill Co. 45 Mich. 103 and held (p. 85) that "upon examination of the general law and the New York decisions and *the decisions of other States*, we find that this statute was enacted for the benefit of the stockholders and that the question cannot be raised by the corporation itself."

It seems to us that no better examples are needed to show that statutes of the nature here in question may effect property outside the State and that they will be so enforced. Evidently decisions under such statutes or that judgment creditors may take advantage of them cannot be held to be of only local application.

The cases relied on by the Respondents and the Courts below.

Numerous cases were cited by the respondents in the Courts below and also on the application for *certiorari*, and statements of the general principles which have for many years afforded rules of decision in this Court where the construction of State statutes or rules of property *clearly local* have been involved, were extensively quoted. Although some of these cases were mentioned and relied on by the Circuit Court and the Circuit Court of Appeals, we submit that they are not material to the issues in this suit.

They will be found to be:

(a) Cases where the fact is stated that the construction of a State statute purely local in effect is the basis of the decision; among which may be cited:

Christy v. Pridgeon 4 Wall 196.
German Bank v. Franklin Bank 128 U. S. 526.
Cross v. Allen 141 U. S. 528.
Forsythe v. Hammond 166 U. S. 506.
Louisiana v. Pillsbury 105 U. S. 278.
Merchants Bank v. Penna. 167 U. S. 461.

(b) Cases relating to the form and subsequent legal effect of an instrument *as such*, and whether it complied with the recording acts, under the law of the local jurisdiction; as:

Randolph v. Quidnick Co. 135 U. S. 457.
Ober v. Gallagher 93 U. S. 199.
Townsend v. Todd 91 U. S. 452.
Etheridge v. Sperry 139 U. S. 276.

(c) Cases where the local law governing the transmission of estates and the tenure of real estate is involved; and where that law can not possibly have any extra-territorial effect.

See U. S. v. Fox 94 U. S. 315.

(d) Cases where a remedy of a purely local nature was provided by the common law of the State as declared by its courts.

Bucher v. Cheshire R. R. Co. 125 U. S. 555.
Shelby v. Guy 11 Wheat 361.
Detroit & Osborne, 135 U. S. 492.

THE CASES CITED BY THE CIRCUIT COURT OF APPEALS in its opinion (Record pp. 169-173) are in like manner either distinctively constructive of a local statute or determinative of a rule of property valid *only* within the local jurisdiction.

They refer to either (1) the omission on the part of the foreign corporation to take some action in which third parties were at the time concerned (even the filing of a particular paper, which is not required by the Act of 1880) in the State where the property was located; (2) the omission to properly execute the mortgage or deed under the laws of the State where the property was situated, or (3) where there was a conflict of law as to the effect of the instrument as a mortgage or deed and the consequent devolution of property thereunder.

See Petition for Rehearing: Record p. 179.

This Court in the case of B. & O. R. R. v. Baugh, 149 U. S. 368, (at 372 to 375) after reiterating the rule laid down in Burgess v. Seligman, (107 U. S. 33 to 34) to the effect, among other things, that established rules enounced by the State courts in their decision particularly with respect to the law of real estate and the construction of State statutes, will be followed by the Federal courts, but that inasmuch as the very object of giving the National courts jurisdiction was to institute independent tribunals without prejudices or sectional views, it would be a dereliction of duty not to exercise an independent judgment in case not actually foreclosed, refers to several cases, among them, Bucher v. Cheshire R. R. Co., 125 U. S. 555, Detroit v. Osborne, 135 U. S. 492, Claiborne County v. Brooks, 111 U. S. 400, to show that where the local law as determined by decision, is respected as

authoritative by this Court, it must appear clearly that the matters under consideration were purely local, that the point decided was of essential local application and could by no stretch of legal reason be extended beyond the borders of the State in such a way as general law is respected abroad.

The Court will notice finally that there is no decision showing that the ruling in the *Pekin case* has ever been since applied by the California court to foreign corporations.

II.

The Act of 1880 does not apply to foreign corporations because the legislation of one State has no effect upon the powers and internal management of corporations organized in other States. The case of Pekin Mining Co. v. Kennedy supra is open to this objection and is therefore in conflict with the later case of Miles v. Woodward 115 Cal. 308.

The Constitution of California (Art. XII, §15) provides:

"No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

The Circuit Court of Appeals held that under this provision the Act of 1880, p. 131, was binding upon foreign corporations (Opinion Record pp. 169 *et seq*), and proceeded upon the theory that the first section of the statute did not relate to the conduct of the internal affairs of such corporations.

It has been established by the Supreme Court of the State of *California in the case of Miles vs. Woodward*, 115 Cal. 308 (310) that:

"The constitution was not designed to limit the powers of the legislature when dealing with the organization and government of corporations which are created by its own will and act. Over such corporations it has and may exercise full powers of control. *Over the organization and internal government of foreign corporations it has no such power. The laws of the State do not have extra-territorial force.* IT WOULD BE MEANINGLESS FOR THIS STATE TO TRY TO LEGISLATE UPON THE INTERNAL AFFAIRS OF SUCH FOREIGN CORPORATIONS AND IT HAS NOT ATTEMPTED TO DO SO."

While the courts of California have never construed the Act of 1880 with respect to the limitation of the internal management of corporations whether foreign or domestic, similar statutes have been enacted in many States; and it has been held by overwhelming authority that such provisions refer to the internal administration of corporations as opposed to the transaction of their business with strangers.

Campbell v. Argenta &c. Co. 51, Fed 1 citing numerous cases. (Dist. of Montana.)

First Nat. Bank v. G. V. B. Mining Co. 89, Fed. 439. (Dist. of Nevada.)

G. V. B. Mining Co. v. First Nat. Bank, 95 Fed. 23. (U. S. C. C. A. 9th Circuit.)

Wood v. Water Works Co. 44 Fed. 147.

Beecher v. Rolling Mill Co. 45 Mich. 103. (COOLEY J.)

Zabriskie v. Cleveland &c. R. R. Co. 23 How. 381.

Hervey v. Railway Co. 28 Fed. 169. (Mr. Justice HARLAN at Circuit.)

Louisville Trust Co. v. Louisville &c. Ry. Co. 43 U. S. App. 550.
S. C. 174 U. S. 552.
St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 393 at 403.

In the case of Pekin Mining Co. v. Kennedy (81 Cal. 356) the Court by deciding that judgment creditors of foreign corporations may question the validity of a prior mortgage under the Act of 1880 in effect holds that the legislature of California may enact laws with respect to the internal affairs of foreign corporations. That such a view of the powers of the legislature has since been repudiated in California appears in the opinion in Miles v. Woodward, *supra*.

In view of the fact that the respondents here seek to enforce an alleged right accruing to the stockholders and to be recognized in effect as the assignees of the latter, the nature of such a right itself as it originally comes into existence is of pertinence.

It clearly grows out of the artificial relations created between a corporation, its directors and its stockholders. It therefore pertains to the internal management of the corporation.

In Madden v. Electric Light Co., 181 Pa. (at 622) the Supreme Court of Pennsylvania in a stockholders' suit quote and adopt the following definition of the Court of Appeals of Maryland:

"What constitutes internal management is well defined by STONE J. in Mining Co. v. Field, 64 Md. 154: 'Where the act complained of affects the complainant solely in his capacity as a member of the

corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation whether acting in stockholders' meeting or through its agents, the board of directors then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction.'"

It is obvious that the nature of this right is *in nowise* changed by a ruling that judgment creditors may enforce it. Such a decision simply means that judgment creditors may take the beneficial results of *rights accruing to the stockholders, as such,* who are the "complainants" comtemplated by the express language of the title of the statute.

The contention of the respondents can only succeed upon the theory that the legislature has power and has in fact *assumed to protect stockholders in a corporation organized and having its corporate existence under and by virtue of the laws of West Virginia.* Under the laws of West Virginia this mortgage was duly authorized and all corporate acts necessary to constitute it a properly executed instrument for creating a lien upon land were performed. The question arises as to whether the legislature of California has jurisdiction to prescribe what acts are necessary as between the corporation and its stockholders to authorize the execution of an instrument, which, upon its face, complies with all the formal requisites imposed upon such instrument by the California laws. We submit that all the powers possessed by the Mining Company as a corporation and all its relations with its stockholders, grow out of and depend for their existence upon the sovereignty creating the corporation, which alone may exercise visitatorial powers. The result of this proposition is that while the legislature of Cali-

fornia may regulate the form of instruments creating a lien upon or in any wise connected with the title to real property located within the limits of the state, and while it may even, *as it has not done*, impose license taxes and conditions precedent to the recognition of the foreign corporation in question, it has no power to dictate in what manner corporate action shall be evidenced, or in any other way interfere with the internal management of such corporation. *It may prescribe conditions for the conduct of business in the State but it can not assume to make laws "for the protection of stockholders" in foreign corporations.* The legislature has never expressly provided that foreign corportions must take certain corporate action, such as described in Section 1 of the Act of 1880, in order to validate an instrument otherwise executed with due solemnity; and we do not think that from any general terms claimed to be employed in isolated parts of that act it can be presumed that the legislature intended any such action.

The law upon the subject has been collated by Mr. Cook in his work on Stock and Stockholders at Section 779 and the elaborate note subjoined.

The attention of the Court is also invited to the following cases in support of the proposition above stated.

Saltmarsh v. Spaulding, 147 Mass. 224.
Vanderpoel v. Gorman, 140 N. Y., 563.
Demarest v. Flack, 128 N. Y., 205.
Coats v. Donnell, 94 N. Y., 163.
Miles v. Woodward, 115 Cal., 308.
American Water Works Co. v. Farmers L. & T. Co., 73 Fed., 956.

In Saltmarsh v. Spaulding *supra* the facts were these:

A foreign corporation was authorized by the laws of New Hampshire where it was organized, to make contracts and to purchase and convey necessary real estate, as well as to adopt by-laws to regulate the powers and duties of its officers. The directors, under a by-law authorizing them to manage and control its business, to hold meetings in Massachusetts, and to appoint necessary agents, ordered the president and treasurer, at a meeting held in Massachusetts, to mortgage the real estate of the corporation, to secure its notes for borrowed money expended thereon; and these officers executed a power of sale mortgage in its name and under its seal: *Held*, that the directors acted within their powers and that the mortgage was valid.

The rationale of this decision appears in the opinion of DEVENS, J. at page 227, as follows:

"While the general principle undoubtedly is, that the law of the place where real property is situate exclusively governs as to the title of parties therein, the disposition and mode of transfer thereof, and the solemnity attending such transfers, and while we do not doubt, that it would be possible to provide by legislation that foreign corporations permitted to own real property situate in this State should only transfer the same by authority of the stockholders, no such provision has been made. (Attorney General v. Bay State Mining Co., 99 Mass. 148.) *While they must comply in their forms of conveyance with those here required, they derive their authority to make them from the rules imposed upon them by the State where they are created.*"

This case clearly brings out the distinction between a state of affairs like that at bar and one where an express condition is imposed upon foreign corporations prerequisite to the transaction of business in the State.

The case of Vanderpoel v. Gorman *supra*, succeeding the other New York cases above cited holds that an assignment for the benefit of creditors made in New York by an insolvent foreign corporation valid under the law of its domicile will be recognized as valid in New York. It is furthermore held that such an assignment is not violative of the provisions of the act "in relation to stock corporations," (Sec. 45, c. 564, Laws of 1890.) which prohibits a transfer or assignment by a corporation in contemplation of insolvency, and that that provision refers solely to domestic corporations; also that the right to make such an assignment exists inherently in all corporations unless expressly forbidden; and the prohibition furnishes no legitimate evidence of the existence of a public policy in that State, which forbids in the case of a foreign corporation the exercise of this inherent right; and that in the absence of any statute or by-law of the corporation providing otherwise such an assignment may be executed by the president and secretary under authority of its board of managers.

Said the Court, per PECKHAM, J. (now Mr. Justice PECKHAM of this Court) at page 570:

"The legislature declares, as above stated, that certain transfers or assignments made by the corporation shall be void. What power had the legislature to enact any such provision as to a foreign corporation? *There is nothing in the section limiting its scope and effect to such property as a foreign corporation might have within this State.* It is a broad enactment effecting every assignment made by a corporation under the circumstances mentioned. Can it be supposed that the legislature had in mind a foreign corporation and intended to assume a jurisdiction to declare such an act even when done outside this State, and in respect to property also outside of its

boundaries, to be void and of no effect? This cannot be supposed, for we cannot impute to the legislature such ignorance upon the subject of its inability to give extra-territorial effect to its own laws. And if it had foreign corporations in mind when proposing to legislate upon the subject, and knew it could not effect the validity of such transfers outside of this State, and intended to provide that such transfers should not carry the title to property of the corporation held within this State and subject to our jurisdiction, it must be clear that language somewhat appropriate to express such purpose would have been used. The language actually used was neither apt nor pertinent for this purpose. It is both appropriate and pertinent when applied to domestic corporations only.

The language of the section clearly implies full and complete jurisdiction over the whole subject matter . . . . . The legislature had such jurisdiction in the case of domestic corporations, while in the case of foreign corporations it had not."

The same conditions as to language employed and the meaning to be ordinarily attached thereto exists in the case at bar and make this New York case of particular interest and applicability.

In the case of the G. V. B. Mining Co. v. Bank 95 Fed. 23 the Circuit Court of Appeals affirming the Circuit Court for the District of Idaho as we have seen applied the New York law to a case where the corporation was organized there but had mortgaged property in Idaho.

In view of the manifest intention of the Legislature by the Act of 1880, to add "*further* protection" for stockholders and make statutory provision with reference to the subject matter of the Act of March 30, 1874, which related to domestic mining corporations and was then under discussion the case of Miles v. Woodward, *supra*

is extremely interesting and seems to indicate beyond doubt the thorough resolution on the part of the Supreme Court of California of the "meaningless" nature of any legislation which might tend to interfere with the internal management of foreign corporations. That case is, we think, an authority for the position of the complainant here. All these cases are based upon the underlying principle of comity universally recognized and applied in the courts of the various States. In the ordinary course of such comity, the petitioner's position cannot be attacked successfully; and to hold in favor of the respondents is in effect to take a position unwarranted by the genius of our institutions and contrary to the established ruling of the courts already made.

THE CONSTITUTIONAL PROVISION (CONST. CAL. ART. XII SEC. 15) RELATING TO THE TRANSACTION OF BUSINESS BY FOREIGN CORPORATIONS IS NOT MATERIAL TO THIS CASE.

The Mining Company purchased of Shoecraft, a resident of New York (Certificate of Incorporation, Record, p. 106) the mine in question and he caused a deed to be given by the Citizens Bank, a California corporation.

Deed, Record, p. 116.

Part of the consideration to be paid under the resolution (Record, p. 71) was $25,000 out of a total proposed issue of $50,000 of first mortgage bonds. One half of the issue therefore stood as purchase money and the mortgage was to those bonds a purchase money mortgage with all the equities thereto belonging.

The mortgage was made to a New York trustee and the bonds were made payable in New York City. (Mortgage, Record, p. 8; Bond, Record, p. 13) The deed was recorded of course by the Mining Company and the mortgage by the trustee. The record having been effected in California the question arises whether the Mining Company transacted business there within the meaning of the constitutional provision.

Counsel for the respondents contend that such was the case.

This point was considered in the case of Cooper Manufacturing Company v. Ferguson, 113 U. S. 727, concerning a statute of Colorada which provided: "sec. 23. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is to be carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this State and shall have no other or greater powers."

This court defining what was meant by the "carrying on of business" said per Mr. Justice WOODS (at p. 734.):

"Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the State, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution required the foreign corporation to have one or more known places of business in the State before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the State. To have known places of business it must be carrying on or intending to carry on business. The statute passed to carry the provision of the Constitution into effect, makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the State where the business of the corporation is to be carried on. The meaning of the phrase 'to carry on' when applied to business is well settled. In Worcester's Dictionary the definition is: 'To continue, as to carry on a design; to manage or prosecute as to carry on husbandry or trade.' The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery and the other party to pay for it, did not constitute a carrying on of business in Colorado.

The obvious construction, therefore, of the Constitution and the statute is, that no foreign corporation shall begin any business in the State, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the State, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business in the State, would be unreasonable and incongruous."

While it appears in that case that the corporation had no purpose of doing any other acts of business in the State of Colorado, it is we submit, equally

apparent that under no circumstances could the filing of a paper or other act not in reality the prosecution of business in the ordinary sense of that term, be considered as affected by the statute.

It is to be noticed that the statute in the case mentioned, which is in substantially the form usually adopted by the various States, provides that a certain act, namely the filing of the paper in the office of the recorder or such other place as may be prescribed, shall take place "*before*" such corporations "are authorized or permitted to do *any* business in this State." Under such a ruling it seems to us obvious that the filing of the deed conveying the property to the company, which was the only act performed within the State of California in the case at bar, cannot in any respect be considered as the transaction of business in that State. The mortgage was not to be authorized in the State nor was the action taken to that end in fact performed there, nor was the mortgage executed there. We submit therefore that the constitutional provision of the State of California with respect to foreign corporations quoted above and relied upon by the respondents' counsel, is of no application here.

See also Fritts v. Palmer 132 U. S. 282 distinguishing between the purchase of real estate and the transaction of business; and Gilchrist v. Helena &c. Co. 47 Fed. 593.

The case of Pinney v. Nelson 183 U. S. 144 in nowise affects this doctrine. There a suit was brought in California to enforce the liability of a stockholder in a Colorado corporation organized to conduct its business in California. It *actually transacted business in California out of which the indebtedness arose*. This

Court applied the Constitution of California (Art. XII: §15) and the Civil Code of California (§322) imposing a stockholders' liability.

Said Mr. Justice BREWER (at p. 151).

"In this case it appears that the *business transactions* out of which these liabilities arose *were carried on* in California. They resulted from *business done* in California by virtue of an express contract made by the stockholders with reference to such business. It is unnecessary to express an opinion upon the question whether any personal liability would be assumed by the stockholders in reference to business *transacted in Colorado.* Parties may contract with special reference to carrying on business in separate States, and when they make an express contract therefor the busines transacted in each of the States will be affected by the laws of those States, and may result in a difference of liability. Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California statutes, independently of the provisions of the Colorado charter. All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, *and* BUSINESS IS DONE *in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business.*"

The Court will at once notice the distinction between such a case and one like that at bar. In the case quoted the liability was directly imposed by the laws of the State where the business out of which it arose was actually carried on. Those laws protected *business transacted within the State.* They did not assume in any wise to protect stockholders of foreign corporations or otherwise interfere with the management of the internal affairs of such corporations.

Moreover it does not appear that this constitutional provision was at all considered in the case of Pekin Mining Company v. Kennedy, (81 Cal. 356) but the report shows that no reference whatever was made to it and that the decision of the Court was in fact merely a decision on the general point that judgment creditors of any corporation which may come before that court whether domestic, or organized in a foreign state having a similar statute in force, may question acts in excess of the powers of the directors of the corporation but not themselves, *ultra vires.*

III.

Even if it should be held that the California Statute (Statutes of 1880 p. 131) does apply to foreign corporations, the mortgage is valid and a decree of foreclosure and sale should be directed.

1. THERE WAS DUE CORPORATE ACTION BY WAY OF RESOLUTION.

On June 25, 1890, as appears by the minutes of that date, the incorporators constituting all of the stockholders held their first meeting. A telegram was read showing that the Certificate of Incorporation of the Company had been filed in the office of the Secretary of State of West Virginia on June 23rd, and

"On motion of W. W. Tucker, seconded by R. H. Pettigrew, Jr., it was '*Resolved*': That the said Gold Hill Mining Company, issue one hundred first mortgage bonds of the denomination of five hundred dollars each, each bond bearing date of July 1st, 1890; and bearing interest at the rate of ten per cent. per annum, payable semi-annually on the first day of January and July in each year, and so run

five years from July 1st, 1890; with the privilege of said company paying off and redeeming the same sooner, by giving to the holders of said bonds six months notice of the company's intention thus to do; to pay off said bonds, and redeem the same on any day interest is payable or on payment of six months interest in advance; and the president and the secretary of said company are hereby authorized and directed to execute said bonds and mortgage for said company, and the said board hereby authorize and direct the seal of said company to be affixed to the same."

Record, pp. 79, 80.

On the 10th day of July, 1890, at a meeting of the board of directors at which all members were present, Mr. Shoecraft was elected president, Mr. Morse, vice president and Mr. Littlefield, secretary and treasurer and it was further "Resolved," that the mine be purchased of Shoecraft, for the stock and bonds secured by first mortgage mentioned in the resolution. (See Minutes Record p. 70, 71.) There is not one resolution or any hint of action on the part of the stockholders or the board in any wise repudiating or questioning the validity of this mortgage which was executed under these resolutions and acknowledged on the 24th day of July, 1890.

In the first place it appears that the action taken at the meeting of June 25th, 1890, by the persons who constituted the incorporators, the stockholders under the Certificate of Incorporation and the first board of directors elected at the meeting was properly taken by those present in their capacity as stockholders, although the minutes inartificially designate them in calling the roll as incorporators. As a matter of fact their function as incorporators

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of the company ceased upon the filing of the articles and the acceptance thereof by the State authorities of West Virginia.

Cook on Corporations, (4th Edition) Sec. 10 and cases cited in notes.
Chase v. Lord 77 N. Y. 1, 11.

The meeting of June 25, 1890, was, we think, entirely valid as a stockholders' meeting.

The action then taken was also good as the action of the promoters and subscribers to all the stock of the corporation (See Certificate of Incorporation, Record p. 106); and it appears from the use of the word "board" near the end of the resolution that these promoters and stockholders who were at that same meeting also elected directors, assumed to act on the resolution to issue the bonds as *de facto* directors of the corporation.

The resolution represented therefore, the action of the promoters in advance of complete organization by the formal election of the board, the stockholders and the *de facto* directors, who were just on the point of becoming directors *de jure*. So far as this resolution represented the action of the promoters acting also as *de facto* directors it was ratified by the resolution to the same substantial effect passed as we have stated at a meeting of the board of directors held on the 10th day of July.

At the outset of a consideration of this branch of the case we desire to call the attention of the Court to the case of Jordon & Co. v. Collins & Co. 107 Ala. 572 to the effect that where the directors of a corporation own all its stock, they may by agreement among themselves authorize its president to sell its assets

and the fact that the authority was not given at a regular directors meeting is immaterial.

STIRLING, J. deciding the case of *In re* Great Northern &c. Co. L. R. 44 Ch. Div. 472 and commenting on the opinion of Lord Bramwell in D'Arcy v. Tamar &c. Ry. Co. (L. R. 2 Ex. 158) said upon this subject (p. 481):

"It is pointed out by Lord *Bramwell*, who took part in the decision, that if a quorum of three, not meeting together and not being regularly summoned, were to act, another quorum of three might meet in a different place and come to exactly an opposite conclusion; and therefore the government of the company by means of quorums so picked up would be impossible. It is also open to this serious observation, that the minority have no means of stating whether they assent to or dissent from the act proposed, and have no means of bringing their views before their colleagues if they do dissent.

These are very serious objections to the validity of the procedure where only a quorum assent to the act; but where the whole body of directors act or assent to the act, even though they do not meet, the validity of the act is not open to the same objections."

See also Bank of Middlebury v. Rutland &c. R. R. Co. 30 Vt. 159, 170.

We think that under this doctrine the resolution of June 25, 1890, so fully evidencing the consent of the stockholders was amply sufficient to authorize the execution of the mortgage. But if action of the board were necessary, we submit that the resolution of July 10, 1890, ratifying the proceedings of June 25, 1890, related back to the action of the promoters and *de facto* directors and is in effect the same as though then perfected; so that the resolution of the meeting of June 25, 1890, was in legal effect an

authorization by the directors of the mortgage and also the consent thereto on the part of all the stockholders.

It was held under a similar statute in Illinois that where directors are the only stockholders but one and they all assent, their meeting as directors is in effect a stockholders' meeting and their vote a sufficient ratification by two thirds in interest of the stockholders.

Thomas v. Citizens &c. Ry. 104 Ill. 462.

Said the Supreme Court of Illinois in that case per Mr. Justice CRAIG (pp. 466, 467):

"Whether the stockholders received such a notice of the meeting as the statute requires, is a matter of no importance. If they met and acted upon the question, their action will be as binding as if they had the proper notice. *The proof shows that they did meet, and assented to the execution of the mortgage. It may be said that the resolution which authorized the loan was the act of the directors, but this is answered by the proof that the directors were the only stockholders of the company but one, and that all the stockholders assented.* THE ACT OF THE DIRECTORS WAS, IN EFFECT, THE ACT OF THE STOCKHOLDERS, *and the resolution which authorized the loan may be regarded as the action or concurrence of the holders of two thirds in amount of the stock of the corporation, which is all that the statute requires.* The meeting, although called a meeting of the directors was in fact a stockholders' meeting. The statute requiring the concurrence of the holders of two thirds in amount of the stock of the corporation before a loan should be made and a mortgage executed, was no doubt passed for the protection of stockholders. It is a matter in which the public have no interest, and it may be true, if the owners of two thirds of the stock had not concurred, they might in a proper proceeding, have avoided the mortgage, but as they did concur in the loan and the mortgage they are concluded by such concurrence."

In Wood v. Whelen, 93 Ill. 153, the promoters had authorized a mortgage which the board of directors of which they were the members afterward recognized. Said Mr. JUSTICE SCOTT for the Supreme Court of Illinois (at p. 164):

"It does appear, however, that the parties adopting the resolution of October 25, 1871, were the promoters of the corporation about to be formed, acting as directors of the *de facto* organization, and after the incorporation was perfected continued to act as directors of the company. Without discussing whether the action of the promoters who may originate a corporation will bind the future corporation, it will appear in the sequel that the action of the promoters of the gas company was fully ratified by the action of the directors of the company on the 27th day of May, 1872, long after the incorporation of the company was completed. *The subsequent action of the legally constituted directory was equivalent to precedent authority to issue the bonds*, and as the rights of no third parties had then intervened there could be no question as to the right of the directors to ratify and confirm the action of the promoters of the corporation. *Stanley* v. *Chester and B. R. W. Co.* 3 My. & Cr. 773."

In the case of Stanton v. New York & Eastern RR. Co. 59 Conn. 272 the law is well stated by ANDREWS, C. J., as follows (p. 285):

"A corporation has power when fully organized to ratify a contract made by its promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes, Morawetz on Corporations 549; *Touche* v. *Metropolitan Warehousing Co.* L. R. 6 Ch. Appeals, 671. And the ratification makes the contract in all respects what it would have been if the requisite power had existed when it was entered into. *Whitney* v. *Wyman*, 101 U. S. R. 397; Angell & Ames on Corporations §304; *Church* v. *Sterling* 16 Conn. 388; *Fleckner* v. *Bank of U. States*, 8 Wheaton 363, STORY, J."

The law of course looks to the substance and no such substantial *or any* compliance with the statute appears in the California cases relied upon by the Circuit Court of Appeals affirming the Circuit Court in its opinion that no due corporate action had been taken.

The case of Curtin v. Salmon River &c. Co. 130 Cal. 345 does not militate against this rule.

In that case there was no valid action on the part of the directors, the meeting not having been properly called and the mortgagee being himself a director and his vote necessary to a quorum. The Court held as a necessary sequence that there was no valid act of the board which could be ratified, and that therefore the attempted ratification by a two thirds vote of the stockholders under the Act of 1880 was of no avail.

The question of estoppel was not considered, it did not appear that all the stockholders were directors or that the promoters were all of the stockholders and directors or that they had ever acted and there were no intervening equities on the part of bondholders or otherwise. The Court remarked (p. 351) that :

"The stockholders are thus made a component part of the power to make a mortgage effective, but cannot by any act of their own, make a mortgage, or validate one that has not been previously authorized and executed [*sic*] by the board of directors."

Even if these remarks were not *obiter* they could not apply to a case like this where the authorizing resolution of the regularly constituted board relates back by way of ratification to the acts of all of the

promoters or *de facto* directors, and the same individuals occupy each of those positions.

Under the circumstances of this case we submit therefore that the substantial compliance with the statute which is shown should be held sufficient.

2. THE MORTGAGE ITSELF HAVING BEEN SIGNED BY OFFICERS HOLDING MORE THAN TWO THIRDS OF THE CAPITAL STOCK OF THE MINING COMPANY, THE REQUIREMENTS OF THE ACT OF 1880 WERE SATISFIED.

Even if it should be admitted, as is not the case of course, that the California statute does apply to this case, that there was no proper corporate action by way of resolution and that judgment creditors can be heard to raise the question, it is respectfully submitted that there was a clear and unequivocal compliance with the terms of the statute, by way of written consent; so that even if the Mining Company were a domestic corporation, its mortgage would be held good.

The statute provides that the instruments referred to in it may be ratified in one of two ways:

(1) "Either in writing signed and acknowledged by such stockholders" or

(2) "By resolution duly passed at the stockholders' meeting called for that purpose."

The Circuit Court of Appeals proceeded upon the theory that because no resolution was actually passed in literal compliance with the statute, there was no ratification such as required.

It is quite clear that the alternative by way of writing signed by two thirds of the stockholders

would be sufficient to sustain the validity of the mortgage.

The question at once arises whether the fact that Shoecraft and Littlefield, the President and Secretary of the Company, signing the mortgage, held at that time more than two thirds of the capital stock was a sufficient compliance with the statute as a ratification by consent.

This matter was argued in the petition for rehearing (Record pages 174–177) to which the Court's particular attention is called.

Said the Circuit Court of Appeals per HAWLEY, J. (Record p. 171) referring to the case of McShane v. Carter *supra*:

"Under this decision there is no room for any discussion as to whether or not there has been any substantial compliance in the present case with the provisions of the statute. There was no literal compliance. And this is held absolutely essential by the decision in McShane v. Carter. This decision was followed in the subsequent cases of Pekin Mining & Milling Co. v. Kennedy, 81 Cal. 356, 362 (in which the principles were applied to a foreign corporation), Granite Gold M. Co. v. McGinnis 115 Cal. 131, 137, and Johnson v. California Lustral Co. 59 Pac. 595, and has therefore become the settled law of this State."

We respectfully submit that this conclusion is not well founded in the facts as they appear in the cases mentioned.

Examination of the case of McShane v. Carter (80 Cal. 310) shows that the deeds there under discussion "were authorized by the Boards of Directors of said respective companies, and were executed

by the proper officers but were not ratified by the stockholders of said corporations." (p. 311)

By the most ordinary use of language this finding means that there was no ratification in either of the methods outlined in the statute so that the decision of the Court proceeded upon a violation of both alternatives, by either of which the mortgage might have been validated.

The case of Pekin Mining Company v. Kennedy (81 Cal. 356) shows (p. 359) that "there was *no evidence* offered, however, *to show that the deed had been authorized by the trustees of the corporation or that it had been ratified by two thirds of the stockholders, nor was there* ANY OTHER PROOF OF ITS EXECUTION." It was therefore held that the title remained in the company and the Court added (p. 363): "This result comes from the fact that *no evidence* was offered to prove that the deed was ratified by two thirds of its stockholders as provided in section 1 of the act concerning mining corporations which went into effect April 23, 1880. (Stats. 1880 p. 131.)"

Indeed in the *Pekin case* two very significant facts appear: (1) There was no authorization even by the directors and (2) there was no evidence of ratification in either of the methods provided in the statute.

A study of the cases of Granite Gold Mining Co. v. Magginness (118 Cal. 131 at 136) and Johnson v. California Lustral Co. (59 Pac. 595) in both of which this Court will observe the tendency of the California Court to limit the meaning of the statute, shows that in the first of these cases the deed was admitted in evidence "without proof of the

consent or ratification of stockholders as required by the Act of April 23, 1880" and that in the latter no further proof of authority was adduced and the salutary rule laid down that the statute in question "must be enforced according to its intent."

It seems therefore that the validity of the execution of the mortgage by persons owning two thirds of the stock as a compliance with the Statute of 1880 has never been passed upon by the California Courts, so that as to this question, the decision of the Circuit Court was entirely untrammelled. As a matter of fact the opinions both of the Circuit Court and the Circuit Court of Appeals, show that the point was not decided by any direct reference to the facts, although it was particularly emphasized in the petition for rehearing in the Circuit Court of Appeals as well as in the brief presented to that Court.

Since the argument in the Circuit Court and before this case came up in the Circuit Court of Appeals, the latter Court had, however, ruled upon an analogous set of facts not nearly so strong as those now presented and had held in favor of the validity of the mortgage. This decision is that of G. V. B. Mining Co. v. First National Bank (95 Fed. 23). In that case the New York statute was construed between the mortgagor and the mortgagee and it was held that where the president and secretary of the mortgagor company executing a mortgage with another party who had endorsed his written assent as stockholder thereon together owned more than two thirds of the company's stock, the mortgage was in entire satisfaction of the provisions of the New York statute.

Unless therefore there was some distinction between the New York statute and the California Act of 1880, in the favor of the mortgagor in that case, it would follow, it seems to us, as a matter of course that the fact that Shoecraft and Littlefield held more than two thirds of the stock of the Mining Company, made their execution of the mortgage a compliance with that portion of the statute providing that ratification may be made "in writing signed and acknowledged by such stockholders."

That Shoecraft and Littlefield held that proportion of the stock appears fully in the testimony.

Stock Certificates Nos. 1-21.

Record, p. 168.

These certificates show that of the stock transferred from Certificate No. 1 issued to Mr. Shoecraft, 39, 466 shares (Certificates No's 2 and 8) were issued to Mr. Littlefield and 79,000 shares (Certificate No. 20) to Mr. Shoecraft; making in all 118,466 shares out of a total capital of 160,000 shares.

The right of Mr. Littlefield to vote the stock standing in his name as trustee or take equivalent action by way of written consent to the mortgage, cannot be doubted.

Says Cook in his work on Corporations (4th Ed.) §612.

"It is the general rule that a person holding stock as trustee is entitled to vote upon the stock, not only where he is duly registered as a holder of stock in trust, but also where he is registered absolutely as a stockholder upon the books of the Corporation."

See also Conant v. Millaudon 5 La Ann 542.
Wilson v. Central Bridge 9 R. I. 590.
Hoppin v. Buffum 9 R. I. 513.
Re Barker 6 Wend 509.
Re Mohawk &c. R. R. 19 Wend 135.
Market St. Ry. v. Hellman 109 Cal. 571.

Inasmuch as Mr. Littlefield was not a mere "dummy" but interested as beneficiary as well (See Assignment endorsed on Certificates No's 2 & 8) the cases of Stewart v. Mahoney Min. Co. 54 Cal. 149 and Smith v. San Francisco &c. Ry. 47 Pac. Rep. 542 of course do not apply; but regard should be had to the rule above quoted, which has received the sanction and support of the Courts generally including the Supreme Court of California.

Said SEARLS, C. in Market Street Ry. Co. v. Hellman (109 Cal. at p. 589) speaking of a meeting of stockholders resulting in a consolidation:

"Some of the stock was held and voted by trustees who not only appeared upon the books of the corporation as such but were really and in fact trustees for other persons. The contention of appellant is that a trustee of stock has no authority to destroy the corporation by merging it in another corporation. The answer to the proposition must be that *the trustee is the legal owner of the stock and as against the corporation and all the world, except his cestui que trust, no* inquiry may be had touching his actions in the premises. (Civ. Code secs. 307, 312.)"

As a matter of fact the New York statute which is set out at length in the petition for rehearing (Record, p. 174) differs from the California statute with respect to acknowledgment and filing of the consent, the New York statute requiring its filing but the dispensing with its acknowledgment and the

California statute requiring an acknowledgment but no filing.

It is, of course, apparent that under the California statute a separate paper signed by the requisite number of stockholders might be executed and filed away among the papers of the company and never actually come to the knowledge of the mortgagee or bond holders. Although such a paper would clearly be sufficient to validate a mortgage, it is to be particularly noticed that neither of these statutes require that the written consent shall be by separate paper; and in the case we have just cited, the Circuit Court of Appeals for the Ninth Circuit held that under the New York statute no separate paper was needed. We do not see how it is possible to evade the conclusion that the same rule applies to the California statute.

Moreover the showing made in the *G. V. B. Mining Co. case*, was more slender than that in the case at bar, because the endorsement of the third stockholder was necessary to make up the two thirds interest. In the present case that amount of stock was held, as we have shown, by the parties signing and acknowledging the mortgage.

We submit therefore that there was apparent error on the part of the Circuit Court of Appeals in this regard to the great detriment of the petitioner.

3. ASIDE FROM FORMAL STATUTORY RATIFICATION, THE MINING COMPANY IS ESTOPPED TO DENY THE VALIDITY OF THE MORTGAGE ON ACCOUNT OF ITS ACQUIESCENCE AND ACCEPTANCE OF THE CONSIDERATION FOR THE CREATION OF THE MORTGAGE LIEN; AND THIS ESTOPPEL BINDS JUDGMENT CREDITORS.

The Circuit Court held the mortgage invalid because in its opinion the instrument was not formally ratified in the statutory manner prescribed and this was affirmed.

Record pp. 56–57, 63, 170–171.

Assuming that the Court was correct in finding that there was no ratification in the precise mode outlined in the statute it by no means follows that the corporation and those claiming under it may not in equity be held to have ratified or become estopped by *its* conduct from avoiding the apparent legal effect of the instrument.

The Court appears to have overlooked this principle and in effect held that foreign corporations *although as insisted, standing on the same footing under the Act of 1880 as domestic corporations*, were only bound when a technical statutory ratification had been shown and not otherwise.

We submit that there is no authority for this position and that the great weight of decision including that of the Supreme Court of California shows that the mode of ratification prescribed in the statute does not preclude an estoppel, in cases where as here the defect is not one of power in the corporation but only irregular execution of that power as between the corporation and its directors and officers.

In G. V. B. Min. Co. v. First Nat. Bank 95 Fed. at p. 33, the Court said:

"A contract of a corporation which is *ultra vires* is something outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature. Such a contract is not voidable only, but

wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side could give the unlawful contract any validity, or be the foundation of any right of action upon it. But, when a corporation, *as well as persons contracting with it*, powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence, or to its action, because such requisites might in fact have been complied with."

In the case of Gribble v. Columbus Brewing Co. 100 Cal. 67 the action was to foreclose a mortgage. The assignee in insolvency who was also a party appealed from a decree on the pleadings. It was held that where the answer denied the authority of the president of the corporation to execute the mortgage but did not deny the facts constituting an equitable ratification of his acts, plaintiffs were entitled to judgment without proof of the president's original authority.

This is entirely consistent with and cumulative to the decision of the same Court in the case of Underhill v. Santa Barbara, etc., Co., 93 Cal. 300, where it is held that acts of directors in violation of a by-law may be ratified by the stockholders, and generally by the same number of shareholders that would be necessary to enact them; and such ratification need not be formally made in a meeting of the stockholders, but may be presumed from the circumstances of the case, such as long acquiesence in acts beneficial to the corporation with knowledge of all the material facts, and may even be presumed without evidence.

Bearing in mind that under the laws of California the powers of corporations can only be exercised through the medium or instrumentality of their boards of directors, the action of the stockholders alone not being enough (Gashwiler v. Willis 33 Cal. 12. Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629) and also that modes of ratification have been pointed out by statute, (Civ. Code §§ 2309, 2310.) the case of Blood v. La Serena Mining Co., 113 Cal. 221 conclusively shows the correctness of the position of the appellant.

There the only authority upon which the president and secretary of a corporation acted in executing a note and mortgage in its name was a resolution passed at the preliminary meeting of the stockholders and before organization of the board of directors. This was held to be insufficient authority and although it was expressly decided that there were no acts of "ratification" satisfying the code provisions, still those provisions were so far unconclusive that the mortgagee could recover upon the theory of estoppel and that the estoppel need not be pleaded under the rule laid down in Goetz v. Goldbaum, 37 Pac. Rep. 646.

Said the Supreme Court of California *per* HENSHAW, J. (at pp. 226 *et seq*):

"It is a general principle that a corporation like an individual, may ratify and validate any authorized act, the doing of which it could, in the first instance, have authorized and empowered. What conduct and proceedings will constitute and amount to a ratification is a question which the courts have been called upon to decide with great frequency. In the literature of the law which is thus full upon the subject there has often been little inclination displayed to distinguish between ratification and estoppel *in pais*. The facts are usually set forth at

length, and the conclusion is reached and expressed that such conduct amounts to ratification; and indeed where the form which the ratification must take is not governed by statutory rules, it may and usually does matter little whether the acts of a principal are said to be such as to constitute a ratification or to be such as to constitute an estoppel. By either name he is held equally bound. But the distinction between the two is nevertheless well defined, and where, as in this State, the mode of ratification is governed by statute it becomes important and necessary to distinguish them. Acts and conduct amounting to an estoppel *in pais* may in some instances, amount also to ratification, but, on the other hand, ratification may be complete without any of the elements of estoppel. The elements of an estoppel *in pais* have for so long been settled in this State that it is superfluous even to refer to the leading cases of *Boggs* v *Merced Min. Co.* 14 Cal. 279; and *Martin* v. *Zellerback* 38 Cal. 300.

The requisites and forms of ratification however are entirely within the provisions of the code . . . . . Ratification is thus a question of legal cognizance, while estoppel *in pais* addresses itself to equity. Ratification under our code is a legal term with a well defined and specific meaning, and to use it interchangeably with estoppel, or with the verbs 'to adopt' or 'to confirm' must result and has resulted in unfortunate confusion . . . . . (page 228). Now while ratification may be proved under a plea of due execution (*Goetz* v. *Goldbaum* 37 Pac. Rep. 646), yet the evidence in this case falls short of proving it, and more strongly tends to establish an estoppel."

The case was sent back for a new trial because the trial court had disposed of it on the question of ratification in plaintiff's favor, and had made no finding on the estoppel.

The same general rule has been recognized without question by Ross J. in the case of Foster v. Bear Valley Irrigation Co. 65 Fed. 836.

These cases show the general policy of the State of California upon the subject of estoppel or equitable ratification; but it is nevertheless contended by the appellees, and that contention appears to have been sanctioned by the Circuit Court of Appeals that the cases of McShane v. Carter 80 Cal. 310, and Pekin Mining Co. v. Kennedy 81 Cal. 356, are applicable and prevent a decree of foreclosure.

This position if it were true, would be in direct contradiction of the general rule established by the cases which we have just cited. The provision with relation to ratification as contained in the Statute of 1880 is not one whit more mandatory than the code provisions, nor can it in any greater degree affect the application of the doctrine of estoppel.

In both cases the Court seems to have entirely overlookod the distinction between contracts, *ultra vires* the corporation itself and those within its powers but dependent upon certain forms and methods by which those powers may be exercised: i. e., the difference between void contracts incapable of ratification by acquiescence and voidable contracts which may be so ratified.

This distinction has been long recognized and was clearly pointed out by Mr. Justice GRAY for this Court in the case of Louisville &c. Ry. Co. v. Louisville Trust Co., 174 U. S. 552 (at 570) in the following language:

"The guaranty by the Louisville, New Albany and Chicago Railway Company of the bonds of the Beattyville Company was not *ultra vires* in the sense of being outside the corporate powers of the former company; for the statute of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its

execution by the company. The statute, indeed, made it a prerequisite, to the action of the board of directors, that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

See also Central Transp. Co. v. Pullman's Car Co. 139 U. S. 24 (at 60).

Counsel laid much stress upon the conclusion drawn by the Supreme Court of California in the case of McShane v. Carter (80 Cal. 310) that as the directors, by construction placed upon the statute, had no power to convey in the absence of the consent of two thirds of the stock, the title did not pass (Respondents' Argument, p. 28); in other words that the instrument was in counsel's words "void."

It seems reasonable that a decision holding an instrument "void" (which term is not used in the case mentioned) even if it be admitted to result from the construction placed upon a statute, is of no greater effect than the language of the statute in case it should expressly declare such an instrument to be void. And if this is so we think that counsel failed to note the applicability of the decision of this Court in St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 393 (402, 403) cited and quoted above where the words "null and void" used in a similar statute in force in Illinois were construed to mean "voidable" *because the statute was in its spirit* ALTHOUGH NOT SO SPECIFIED IN ITS TITLE "*for the protection of stockholders*" and not so inherently

beyond the powers of the corporation or against the interest of the public as to be void. To construe the Illinois statute otherwise would have been absurd under the general rules of corporation law, and a State decision so plainly objectionable on that ground can scarcely be of value in this court. (See Remarks of COOLEY J. in Beecher v. Rolling Mill Co. 45 Mich. at 108.)

The case at bar is distinguishable at a glance from those in which the instrument in question is absolutely void as against public morals or affecting public rights, e. g. as against Sunday laws (Reeves v. Butcher 31 N. J. Law 224); or beyond the power of a municipal division of the State (German Bank v. Franklin Co., 128 U. S. 526); or where a corporation having failed to perform certain acts necessary *to be performed within the State* as prerequisite to the conduct of its business therein, seeks to avail of a contract made in the conduct of such business (Cincinnati &c. Co. v. Rosenfield 55 Ill. 85; Miller v. Ammon 145 U. S. 421) or where the instrument is one which "the corporation had no right to create" i. e. void *per se* (Davis v. Bank 4 McLean 387; Root v. Wallace 4 McLean 8; Root v. Goddard 3 McLean 102) or where the corporation seeks to recover under a *continuing* or *executory* contract which it "had no power to make" (Penna. R. R. Co. v. St. Louis &c. R. R. Co. 118 U. S. 290; Central Transportation Co. v. Pullman's &c. Co. 139 U. S. 24) or where in the case of National Banks the question presented is "not one of irregularity of organization, or of abuse of a legal power but of an attempt to exercise a power *expressly prohibited by statute*" (McCormick v. Market Bank 165 U. S. 538, 553) or where under established law that National Banks "cannot rightfully exercise any powers except

those expressly granted" a purchase by one bank of the stock of another "was entirely outside of the powers conferred upon the bank" and a stockholder was not estopped to raise the question (California Bank v. Kennedy 167 U. S. 362, 366, 370).

Many other instances may be presented where the contracts under consideration were immoral, against public policy or otherwise void *per se* as negotiable paper void *ab initio*, and particularly where they were executory in whole or part or "disable the corporation from performing its obligations to the government and to the public" (SANBORN, J. for the Circuit Court of Appeals for the Eighth Circuit in Sioux City &c. Co. v. Trust Co. 82 Fed. 124 at 134 distinguishing Thomas v. R. R. Co. 101 U. S. 71; Penna. R. R. v. St. Louis &c. R. R. 118 U. S. 290; Oregon &c. Co. v. Oregonian &c. Co. 130 U. S. 1; and Central Trans. Co. v. Pullman's &c. Co. 139 U. S. 24 from one like the instant case).

In the case of Blood v. La Serena Mining Co. 113 Cal. 221, we have seen that a mortgage *absolutely unauthorized and never ratified according to statutory requirements* may be validated by estoppel, so that where there have been sufficient facts to make out an equitable estoppel we submit that it is absurd to argue that the *McShane* and *Pekin Mining Co.* cases have any application.

Statutes similar to the Act of 1880 as we have seen, exist in many of the States and it has been uniformly held that they in nowise nullify the application of the doctrine of estoppel whether based upon acts of recognition or the retention of benefits under the instrument. The courts are alert to apply the distinction between acts void as to the

company and those merely unauthorized by it but capable of validation under the general rules governing voidable acts. In some of the older cases the confusion of these classes of acts has led to erroneous and apparently conflicting decisions but the distinction has been so strongly emphasized by the later cases that it should never be lost sight of.

St. Louis &c. R. R. v. Terre Haute &c. R. R. 145 U. S. 403 and cases cited.
Campbell v. Argenta &c. Co. 51 Fed. 1.
G. V. B. Mining Co. v. Bank 95 Fed. 23.
Nevada &c. Syndicate v. Nat. Nickel Co. 96 Fed. 133.
Sioux City &c. Co. v. Trust Co. 82 Fed. 124.
Aurora &c. Soc. v. Paddock 80 Ill. 263.
McCurdy's Appeal 75 Pa. St. 290.
Wood v. Whalen, 93 Ill. 153.
Hanson v. Annapolis, etc. R. R. Co., 50 Md. 490.
Fidelity Co. v. S. V. R. R. Co., (W. Va.) 9, S. E. Rep. 180.
Trader v. Jarvis, 23 W. Va., 100, 108.
Texas etc., Ry. Co. v. Gentry, 69 Texas 625.
Page v. Fall River R. R. Co., 31 Fed. 257.
Merchants' Bank v. State Bank, 10 Wall 608.
See also Mining Co. v. Anglo-Californian Bank, 104 U. S. 192.

Moreover where benefits have been retained even under *ultra vires* acts, the corporation and its creditors are estopped to raise the question.

Jones v. Guarantee, &c. Co. 101 U. S. 622.

R. R. Co. v. Ellerman 105 U. S. 166.
Bank v. Matthews 98 U. S. 621.

This is based upon the well recognized rule of equity that the doctrine of *ultra vires* when invoked for or against a corporation should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong.

Railway Co. v. McCarthy, 96 U. S. 258.
Jones v. Guarantee &c. Co. *supra.*

The right of the petitioner here is inherently just and makes this rule applicable.

The bonds issued upon have naturally passed into the hands of numerous holders for value and as they are negotiable in form, if for no other reason they would on that account be entitled to the protection of this Court. Having been issued, however for valuable consideration with the full consent of the stockholders and board of directors and through repeated ratification these bonds under those principles of justice and equity upon which the courts have uniformly proceeded are entitled to protection and the foreclosure should be decreed. A merely casual glance at the minutes in evidence will show the great number of meetings at which resolutions were passed, the effect of which clearly shows the intention on the part of the stockholders and the board to recognize the bonds as valid outstanding obligations and the mortgage as legal security for them.

Record pp. 69, 70, 71, 73, 79.

The existence of the bonds as valid outstanding obligations has been conceded, as we have indicated above.

WE SUBMIT THEREFORE, that the decrees of the Circuit Court of Appeals and the Circuit Court are erroneous and that they should be reversed and a decree of foreclosure directed as prayed.

C. WALTER ARTZ,
For Petitioner.